Supreme Court, U.S.
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No. 87-5428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRENTISS HOUSTON

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in holding that it lacked jurisdiction to hear a *pro se* prisoner's appeal from dismissal of his petition for habeas corpus when he gave his notice of appeal to prison authorities for mailing twenty-seven days after entry of the district court judgment but the notice was not marked filed by the clerk's office until the thirty-first day?

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PRIOR OPINIONS

The relevant prior opinions in this matter of the United States District Court for the Western District of Tennessee, Eastern Division, and the United States Court of Appeals for the Sixth Circuit are presented in the joint appendix. J.A. 2, 31. The decision on the merits of the United States District Court for the Western District of Tennessee, Eastern Division is reported at 625 F.Supp 786 (W.D. Tenn. 1986). The decision of the United States Court of Appeals for the Sixth Circuit is unpublished, but the disposition is reported at 819 F.2d 289 (6th Cir. 1987).

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit dismissed Houston's appeal from the denial of his petition for habeas corpus on May 22, 1987. The Sixth Circuit denied the petition for rehearing en banc on July 10, 1987, and mandated that order on July 21, 1987. On September 8, 1987, the petitioner filed a petition for writ of certiorari based upon 28 U.S.C. Section 2101(c) and a motion for leave to proceed *in forma pauperis*. On January 19, 1988, this Court granted the petition for writ of certiorari and motion for leave to proceed *in forma pauperis*.

RELEVANT STATUTE AND RULES

28 U.S.C. § 2253

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

* * *

Federal Rules of Appellate Procedure, Rule 3(a)

Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

* * *

Federal Rules of Appellate Procedure, Rule 4(a)(1) & (5)

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is

filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, which every occurs later.

* * *

Federal Rule of Civil Procedure, Rule 7(b)

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

STATEMENT OF THE CASE

Prentiss Houston was indicted by an Obion County, Tennessee grand jury on October 11, 1982, for first degree murder. On November 15, 1982, after being informed that the State would seek the death penalty, Houston entered a guilty plea to second degree murder and received a fifty year sentence as a range two offender. At that time Houston was not eligible for the death penalty under the holding in *Enmund* v. *Florida*, 458 U.S. 782 (1982).

Although Houston was sentenced pursuant to the Tennessee Class X felony law, Tenn. Code Ann. §§ 40-38-301

to -303 (1982 Kepl.) (repealed 1985 Tenn. Pub. Acts (1st E.S.) CL.5 § 7), which has significant repercussions for an inmate, neither, the trial judge nor his trial counsel explained to him the nature of his conviction or the direct consequences of his plea. Following the exhaustion of his state remedies, Houston filed a pro se petition under 28 U.S.C. § 2254 for a writ of habeas corpus in the United States District Court for the Western District of Tennessee, Eastern Division. That court dismissed the petition by written opinion on January 6, 1986, without either appointing counsel or conducting an evidentiary hearing. The judgment dismissing the petition was entered on January 7, 1986. J.A. 19; *Houston* v. *Lack*, 625 F.Supp. 786 (W.D. Tenn. 1986).

In January 1986, Houston had no access to legal materials as a result of the destruction of the materials during a disturbance at the Turney Center in Only, Tennessee where he was incarcerated. Additionally, during this time Houston was transferred to another institution, Lake County Regional Correctional Facility, where he spent time in a mandatory orientation program. Thereafter, Houston, still proceeding *pro se*, drafted and presented to his custodians a notice of appeal, on February 3, 1986. Houston attempted to receive a stamp-filed copy of his Notice and to use faster mail service but was disallowed those opportunities due to his indigency. The notice of appeal was marked "filed" by the district court at 8:30 a.m. on February 7, 1986, one day beyond the thirty-day filing period as established in Rule 4(a)(1) of the Federal Rules of Appellate Procedure. J.A. 21.

Houston was not notified of the lateness of his notice of appeal, so he did not file a motion for extension of time as allowed by Federal Rules of Appellate Procedure 4(a)(5). He did, however, request a certificate of probable cause on

February 19, 1986, and designate record portions on February 27, 1986, further evidencing his reliance upon his perfection of the notice of appeal.

On February 18, 1986, the district court filed and transmitted copies of its certificate of probable cause to Houston. That certificate noted that Houston's petition had presented "a question of first impression" in the jurisdiction. J.A. 22. On March 5,1986, the United States Court of Appeals for the Sixth Circuit circulated to Houston a briefing schedule. It was not until March 21, 1986, 13 days after the time had expired for Houston to request an extension of time within which to file his notice of appeal, Fed. R. App. P. 4(a)(5), that Houston was first notified of the untimeliness of his notice of appeal.

On March 21, 1986, the United States Court of Appeals for the Sixth Circuit entered an order requiring Houston to "show cause in writing not later than 21 days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction." J.A. 21. Within that time, Houston, still proceeding *pro se*, filed a response headed "Cause for Delay" in which he detailed the many reasons which delayed his notice of appeal and attached documentary evidence. J.A. 26. Thereafter, Houston filed a supplement which requested that the court retain jurisdiction under the provisions of Federal Rules of Appellate Procedure 3 and 4 and the authority of *Fallen* v. *United States*, 378 U.S. 139 (1964). J.A. 28. On August 23, 1986, the Sixth Circuit Court of Appeals appointed counsel and directed that the jurisdictional issue be addressed. No ruling was made on Houston's attempt to show cause for the delay.

Following the filing of briefs by Houston and the State of Tennessee, the Sixth Circuit scheduled oral argument.

At the argument the court dismissed the appeal from the bench pursuant to Rule 19 of the Sixth Circuit Rules. An order of dismissal was entered on May 22, 1987. J.A. 31. A timely petition for rehearing en banc was filed but denied by the United States Court of Appeals For the Sixth Circuit on July 10, 1987. J.A. 32. From that denial, a writ of certiorari was sought by Houston on September 8, 1987, and granted on January 19, 1988.

SUMMARY OF ARGUMENT

Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed "within 30 days after the date of entry of the judgment or order appealed from." Subsection (a)(5) allows the district court to extend this time for excusable neglect or good cause upon motion made within thirty days following expiration of the time for appeal. Such an extension may not exceed the latter of the expiration of the second thirty days or ten days after entry of the order granting an extension. The filing of a notice of appeal within the original thirty days or within such time as extended by motion and order is mandatory and jurisdictional. *Browder* v. *Director, Dep't of Corrections of Illinois*, 434 U.S. 257 (1978).

In this case, Petitioner Prentiss Houston, acting *pro se*, delivered his notice of appeal to prison authorities for mailing twenty-seven days after entry of the order dismissing his petition for a writ of habeas corpus on January 7, 1986. Although Houston requested that the notice be sent by air mail, the prison authorities refused since Houston was unable to pay the air mail postage. His notice of appeal was stamped filed by the district court clerk at 8:30 a.m. on February 7, 1986, the thirty-first day after entry of the order dismissing the appeal. Within the thirty days following expiration of the initial thirty day

appeal period, Houston applied for and was granted a certificate of probable cause under 28 U.S.C. § 2253 and received a briefing schedule from the clerk of the United States Court of Appeals for the Sixth Circuit. He also designated record portions for the appeal. Not until March 21, 1986, thirteen days after the expiration of the second thirty day period, was Houston apprised of any question as to the timeliness of his appeal.

This Court recognized in *Fallen* v. *United States*, 378 U.S. 139 (1964), that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Id.* at 142. In *Fallen*, an unrepresented inmate who was handicapped, ill at the time of his conviction and thereafter, and who had been transferred to the penitentiary shortly after his motion for new trial had been denied, gave his notice of appeal to prison authorities for mailing in time for it to reach the clerk's office within the time allowed for appeal. The notice, however, arrived four days after expiration of the appeal period. This Court held that, "[s]ince petitioner did all he could do under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144. Here, Houston was incarcerated at a prison whose law library was destroyed in a riot, locked down as a result of the riot, and transferred to a different state prison during the initial thirty day appeal period. Despite these obstacles, the *pro se* petitioner managed to prepare a notice of appeal and present it to prison authorities for mailing twenty-seven days after judgment. His request to send it air mail was denied due to his inability to pay postage. Under these circumstances, Houston "had done all that could reasonably be expected to get the letter to its destination within the required [thirty] days," *id.* at 144, and his appeal was timely under *Fallen*.

In addition, it appears that there is a substantial likelihood that Houston's notice of appeal may actually have been received in the clerk's office prior to February 7. His notice of appeal is marked filed at 8:30 a.m. on that day, as are all other papers filed by Houston with the clerk of the United States District Court for the Western District of Tennessee in Jackson. Since the clerk's mailing address is a post office box, it appears to be possible that Houston's notice may actually have been in the Clerk's custody on February 6 but not stamped filed until the morning of the following day. Since, as the Fifth Circuit held in *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960), it is receipt rather than filing that determines timeliness, the court of appeals should have at least remanded for a determination of when the notice was actually received before dismissing the appeal. *See United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976); *Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir.), *cert denied*, 414 U.S. 818 (1973).

This Court has also recognized certain "unique circumstances" that justify an expansive reading of the formalities for perfecting an appeal. In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), the Court held that a party who had reasonably relied on the district court's erroneous grant of an extension of time to appeal had made "a showing of unique circumstances" that rendered its appeal timely. *Id.* at 217. Similarly, in *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964), and *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), the Court found unique circumstances when the appellants had reasonably relied on the trial court's actions in perfecting their appeals. In this case, Houston reasonably relied upon the district court's grant of a certificate of probable cause and the court of appeal's issuance

of a briefing schedule as indications that his appeal was timely. Both of these actions took place during the time in which Houston could have filed a motion for extension and shown excusable neglect to save his appeal rights. These are precisely the sort of unique circumstances recognized in *Harris*, *Thompson*, and *Wolfsohn*, and Houston's appeal should have been considered on the merits by the court of appeals.

Finally, Houston's late-filed notice of appeal may itself be considered a motion for extension under Rule 4(a). Although a common practice prior to 1979, the courts of appeal have abandoned this approach since the 1979 amendments to Rule 4(a). *See Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984). These decisions, however, fail to pay proper deference to the role of the writ of habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). These decisions are also inconsistent with the leniency with which this Court has applied rules of practice and pleading to *pro se* petitioners. *See Darr* v. *Burford*, 339 U.S. 200, 203-04 (1950); *Price* v. *Johnston*, 334 U.S. 266, 269 (1948); *Holiday* v. *Johnson*, 313 U.S. 342, 350 (1941). In similar situations at least two circuits have suggested or required that the clerk's office screen notices of appeals and notify *pro se* litigants of the necessity of filing a motion for extension of time. *Campbell* v. *White*, 721 F.2d 644 (8th Cir. 1983); *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979). While the Sixth Circuit noted the desirability of such a rule, *Pryor* v. *Marshall*, 711 F.2d 63 (6th Cir. 1983), it was not adhered to in Houston's case. Given the unique role of the writ as the key to the prison door for citizens illegally confined, and its unique procedures, *Harris* v. *Nelson*, 394 U.S. at

294-95, a *pro se* habeas corpus petitioner's late-filed notice of appeal should be treated as a motion for extension if filed within the time allowed by Rule 4(a)(5).

ARGUMENT

A. Houston's Notice Of Appeal Was Timely Filed Under *Fallen* v. *United States*, 378 U.S. 139 (1964).

The Federal Rules of Appellate Procedure require the filing of a "notice of appeal with the clerk of the district court within the time allowed by Rule 4" in order to appeal a decision of a district court. Fed. R. App. P. 3(a). The "time allowed by Rule 4" is "30 days after the date of entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1). In the case at bar the United States District Court for the Western District of Tennessee entered its order dismissing Houston's petition for writ of habeas corpus on January 7, 1986. J.A. 19. On the twenty-seventh day after that order was entered, Houston deposited with his custodian for mailing a notice of appeal. That notice, according to the file stamp of the district court, was filed at 8:30 a.m. on February 7, 1986, or one day after the expiration of the time allowed in Rule 4(a)(1).

While it is true that the timely filing of a notice of appeal is jurisdictional, *United States* v. *Robinson*, 361 U.S. 220, 224 (1960), technical compliance with Rules 3 and 4 may be excused when it cannot "fairly be exacted." Fed. R. App. P.3 advisory committee note. The rules themselves allow the court to assist the litigants in rectifying mistakes when their notice if filed too early, Fed. R. App. P.4(a)(2)("shall be treated as filed after [entry of the judgment or order] and on the day thereof."); in the wrong court, Fed. R. App. P.4(a)(1) (transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date [it was received by the appellate clerk"]); or too

late, Fed. R. App. P.4(a)(5) ("upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal . . . ."). This flexibility reflects the policy of the rules to ensure justice without slavish regard to formality.

A liberal and flexible view of the notice of appeal requirements is particularly relevant to *pro se* litigants who are unskilled and untrained in the law. The advisory committee notes support such a construction with regard to Rule 3 and late-filed notices of appeal. Fed. R. App. P.3 advisory committee note. The committee cited four cases, all but one of which dealt with treating late-filed notices as timely under particular circumstances. *Fallen* v. *United States*, 378 U.S. 139 (1964); *Richey* v. *Wilkins*, 335 F.2d 1 (2nd Cir. 1964); *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963); *Riffle* v. *United States*, 299 F.2d 802 (5th Cir. 1962).

Rule 4(a)(5) of the Federal Rules of Appellate Procedure addresses the procedure by which a litigant can preserve his right to appeal after the expiration of the thirty-day appeal period. The rule allows the district court to "extend the time for filing a notice of appeal" if the litigant makes a showing of "excusable neglect or good cause." Fed R. App. P.4(a)(5). The rule, as amended in 1979, provides that the extension may be granted "upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." *Id.* The motion for extension of time may be filed *ex parte* before the expiration of the time period but notice must be given to all parties if the notice is filed after the expiration of the time period. *Id.*

The Rule itself is derived from former Rules 5(e) and 73 of the Federal Rules of Civil Procedure and Rule 37 of the

Federal Rules of Criminal Procedure. Fed. R. App. P.3 advisory committee note. J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice Rules 3 and 4 ¶ 204.01 (2d ed. 1987). Since Rules 3 and 4 "merely restate" their predecessors, decisions under the former rules are equally applicable to Rules 3 and 4. *Id.* Consequently those decisions under the former civil and criminal procedure rules which "dispense with literal compliance" with the rules apply to situations arising under the successor rules. *Id.*

The decision cited by the advisory committee and most parallel to this case arose under former rule 37(a)(2) of the Federal Rules of Criminal Procedure but is emphasized by the committee as equally controlling in rule 3 and 4 cases. In *Fallen* v. *United States*, 378 U.S. 139 (1964), an indigent defendant attempted to appeal his criminal conviction and sentence within the time allowed by former-rule 37(a)(2) of the Federal Rules of Criminal Procedure. Although Fallen had been represented at trial by counsel, and had inquired about his right to appeal "as an insolvent," 378 U.S. at 140, his attorney withdrew immediately after sentencing and Fallen was left to accomplish his appeal *pro se*.

One day following his sentencing, on January 16, Fallen, who was paraplegic and also suffering from influenza, was returned to a hospital in Atlanta, where he was not allowed visitors. Presumably on January 23, Fallen wrote letters requesting a new trial and an appeal but those letters were not received by the clerk's office until January 29, four days after the time period prescribed in rule 37(a)(2) had expired.

The lower court appointed counsel to argue Fallen's motion for new trial but never decided the issue of the timeliness of the appeal. Upon the government's motion,

the United States Court of Appeals for the Fifth Circuit dismissed the appeal as being untimely filed. *Fallen* v. *United States*, 306 F.2d 697 (5th Cir. 1962), *rev'd*, 378 U.S. 139 (1964). In its opinion, the Fifth Circuit recognized that other jurisdictions applied "a more liberal rule," 306 F.2d at 703, (citing *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951); *Wallace* v. *United States*, 174 F.2d 112 (8th Cir., *cert. denied*, 337 U.S. 947 (1949); and that the presence of constitutional issues might require consideration of a belated appeal. *Id.* at 703 (citing *Chessman* v. *Teets*, 354 U.S. 156 (1957)). Under the circumstances, however, the court held that Fallen's timely mailing was not timely filing. Judge Rives, in his dissent, noted that this Court had recently approved the application rejected by the Fifth Circuit majority. *See Coppedge* v. *United States*, 369 U.S. 438, 442 n.5 (1962)(citing *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951)), and had required liberality in viewing papers filed by "indigent and incarcerated defendants as equivalents of notices of appeal . . . to preserve the jurisdiction of the Courts of Appeals." 369 U.S. at 442 n.5.

This Court granted certiorari, *Fallen* v. *United States*, 374 U.S. 826 (1964), and reversed the Fifth Circuit's dismissal of Fallen's appeal. 378 U.S. 139 (1964). "Overlooked, in our view was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." 378 U.S. at 142. While it is true that the Court mentioned the "admonition" of fairness set out in rule 2 of the Federal Rules of Criminal Procedure as one basis for its decision, it also emphasized Fallen's appearance without counsel, his transfer, his lack of legal training, his lack of access to legal materials, and his timely mailing. The Court found "no reason on the basis of what this record discloses to

doubt that petitioner's date at the top of the letter was an accurate one and that subsequent delays were not chargeable to him." *Id.* at 143-44. The Court thus concluded that "[s]ince petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144.

Justices Stewart, Harlan, Clark and Brennan, in the concurring opinion, suggested that "in such a case, the jailer is in effect the clerk of the District Court . . . ." *Id.* at 144. While it might be necessary in some cases to remand for a determination of the date of delivery, the government had conceded that Fallen delivered his notice of appeal to prison authorities for mailing within the time period allowed.

The flexibility and fairness of *Fallen* has been demonstrated in lower court cases some of which precede and others which follow this Court's opinion in *Fallen*. In *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963), the Tenth Circuit permitted an untimely appeal to proceed when the notice of appeal had been mailed in time to be timely received although it was not. In *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951), a one-day late notice of appeal was deemed timely when "the communication was prepared in time, and the petitioner did all he could do to have it delivered to the clerk . . . in time." *Id.* at 42. The petitioner had given the deputy his notice on the seventh day but the clerk had not received it until the eleventh day. In *Wallace* v. *United States*, 174 F.2d 112 (8th Cir., *cert. denied*, 337 U.S. 947 (1949), a notice of appeal dated June 8 did not arrive until June 23, for a number of reasons. The court allowed the appeal notwithstanding the lateness "[i]n view of his incarceration and his conceded efforts to take an immediate appeal. . . ."

Id. at 114. In *Rothman* v. *United States*, 508 F.2d 648 (3rd Cir. 1975), an order was entered denying a 28 U.S.C. Section 2255 motion on November 8, 1973. This inmate dated a notice of appeal on January 4, 1974, but the notice was not received until January 17, 1974. Because it was not accompanied by the appropriate fees, the notice was not docketed until January 30, 1974. On appeal, the Court held that since the letter mailed on January 4 would have been received ordinarily by the January 7 deadline, the notice might be deemed timely. However, because the notarization of the notice of appeal bore the date January 10, 1974, thus rebutting the *Fallen* majority's presumption that the document was mailed on the date recorded, remand was necessary to determine if the prisoner filed his notice within the time prescribed by *Fallen*.

Fallen, its forebearers and its progeny, recognize that an inmate, because of his confinement, is oftentimes rendered helpless in his attempt to comply with the procedural requirements of the rules. When, as Fallen, the *pro se* litigant does all that he can do to perfect a timely appeal, the flexibility required by the rules should treat the notice of appeal as timely. As this Court has generally recognized "it is [the Court's] duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar." *Coppedge* v. *United States*, 369 U.S. 438, 446-47 (1962) (footnote which recognizes statistics proving no greater chance of frivolous appeal by *pro se* litigant omitted). "A liberal view of papers filed by indigent and incarcerated defendants," *id.* at 422 n.5, must be taken particularly when the litigant's *pro se* position has already caused disadvantages. *Id.* (citing *Lemke* v. *United States*, 346 U.S. 325 (1963) (premature notice of appeal deemed timely)); *O'Neal* v. *United States*, 272 F.2d

412 (5th Cir. 1959) (appeal bond accepted as notice of appeal); *Tillman* v. *United States*, 268 F.2d 422 (5th Cir. 1959) (petition for leave to appeal in forma pauperis sufficient to constitute notice of appeal); *Belton* v. *United States*, 259 F.2d 811 (D.C. Cir. 1958) (letter received before judgment and appearance in brief and by oral argument constitutes notice of appeal); *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951) (notice of appeal delivered to deputy within time period though arrived after expiration was timely); *Jordan* v. *United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956) (petition for mandamus deemed notice of appeal).

Herein Houston, at the mercy of his custodians, delivered his notice of appeal for mailing on February 3, 1986. J.A. 28. His preparation was hampered by his lack of counsel, his lack of legal training, the absence of legal materials due to a riot, his transfer to a new facility, and the regimen he had to follow daily. J.A. 26. Notwithstanding these significant barriers, Houston managed to prepare a notice of appeal which met the requirements of Rule 3. J.A. 21. He obviously desired to appeal the decision of the district court which was rendered without a hearing. Additionally, he managed to deliver the document to his custodian within sufficient time for it to arrive at the district court. J.A. 28. Although he contemplated attempting a speedier mail service, Houston's poverty prevented him from securing a more reliable delivery service. J.A. 26.

Within days of the delivery of his notice of appeal Houston requested and received a certificate of probable cause, J.A. 1, designated the portions of the record for appeal, J.A. 1, and received his briefing schedule. Only after the time provided in the rules for the filing of a

motion for extension had expired, Fed. R. App. P.4(a)(5), did Houston, still *pro se*, learn that his notice had been untimely filed. Under these circumstances Houston did all that he could do. His appeal should not be denied because he failed to meet the strict requirements of the rule.

B. The Court Of Appeals Erred In Holding That It Lacked Jurisdiction When There Is A Strong Possibility That Houston's Notice Of Appeal May Have Been Received Within Thirty Days Of Entry Of The Order Dismissing His Petition.

Petitioner Houston's notice of appeal from the district court's order of January 7, 1986, dismissing his petition for writ of habeas corpus was stamped filed at 8:30 a.m. on February 8, 1986. If the clerk's notation of filing was final, this might well be the end of Houston's appeal rights. The courts of appeals, however, have not applied such a Draconian rule; rather, they have been willing to go behind the clerk's notation to discover if the notice was actually received during the thirty day appeal period. *See* J. Moore, B. Ward, and J. Lucas, 9 Moore's Federal Practice ¶ 203.10 (2d ed. 1987). The court of appeals erred in this case by failing to inquire into the time Houston's notice of appeal was actually received by the clerk's office.

A review of the record discloses that the majority of the filings by both parties in the District Court were stamped filed at 8:30 a.m. Houston's petition under 28 U.S.C. Section 2254 was marked filed at 8:30 a.m. on May 15, 1985. His supporting brief was apparently mailed from Only, Tennessee, on June 13, 1985, and stamped received by the clerk's office in Jackson, approximately seventy miles from Only, *see* Rand-McNally Standard Highway Mileage Guide 444 (1973); 1987 Rand-McNally Commercial Atlas and Marketing Guide 226 (118th ed. 1987), at

8:30 a.m. on June 18, 1985. The answer filed on behalf of Warden Lack by the Tennessee Attorney General's office was mailed from Nashville on November 8, 1985, and stamped filed at Jackson, a distance of one hundred twenty-six miles from Nashville, *see* Rand-McNally Standard Highway Mileage Guide 227 (1973), at 8:30 a.m. on November 13, 1985. Houston's response brief was mailed from Only on November 15, 1985, and stamped filed in Jackson at 8:30 a.m. on November 19, 1985. His motion for permission to copy transcripts was mailed from Only on December 11, 1985, and stamped filed at 8:00 a.m. on December 13, 1985. Six days after the District Court dismissed his petition, Houston was transferred from the Turney Center at Only to the Lake County Regional Correctional Facility at Tiptonville, Tennessee. *See* J.A. ___. His notice of appeal and brief were mailed from there on February 3, 1986, but were not filed in Jackson, a distance of approximately eighty-one miles, *see* Rand-McNally Standard Highway Mileage Guide 444 (1973), until 8:30 a.m. on February 7, 1986,—the thirty-first day following entry of the order of dismissal. Since the Western District's clerk uses a post office box as his mailing address, it appears possible that the custom may be to file all papers received by mail at the start of each day. If this is the case, then it is equally possible that Houston's notice of appeal may have actually been received on February 6, the thirtieth day, but not filed by the clerk until the next morning. If so, Houston's appeal was timely.

The Court of Appeals for the Fifth Circuit was faced with an ambiguous situation in *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd. on other grounds*, 362 U.S. 396 (1960). In that case, the plaintiff had appealed from judgment entered on a jury verdict for the defendant in a Federal Employer's Liability Act case

on December 5, 1957. Plaintiff's counsel mailed a notice of appeal via air mail on January 2, 1958. Since the clerk's office was closed on January 2 and 3, and the following two days were a Saturday and Sunday, the notice was not marked as filed until January 6, the thirty-first day following entry of judgment. The court of appeals found that the notice was in the clerk's custody within thirty days and that the appeal was, therefore, timely. This result was based on the Fifth Circuit's conclusion that "[i]t is the time when the clerk receives actual custody of the notice which determines whether this court has jurisdiction over the appeal, and under circumstances such as are present in this case, the notice may be received in the clerk's custody and control even though it has not yet been manually handled and marked 'filed' by the clerk or his deputy." *Id.* at 81. Although this Court reversed on the grounds that the district court's jury instructions were unduly restrictive, 362 U.S. 396 (1960), *Ward* has come to stand for the proposition that it is receipt rather than filing of a notice that determines the timeliness of an appeal. *Cf. Parissi* v. *Telechron, Inc.*, 349 U.S. 46 (1955) (appeal is timely if notice received within thirty days notwithstanding lack of required filing fee).

The *Ward* principle has been applied in similar cases in which the circumstances suggested that the clerk may have received the notice earlier than the filing date noted on the document. In *Hegler* v. *Board of Educ.*, 447 F.2d 1078 (8th Cir. 1971), the Eight Circuit Court of Appeals found that when the clerk was on leave on August 26 through 28 and the appellee's counsel, whose office was located in the same town as the clerk's, received his service copy of the notice on August 28, the appellant was entitled to a presumption that the clerk had received the notice of August 28, the thirtieth day. In *Da'Ville* v. *Wise*,

470 F.2d 1364 (5th Cir., *cert. denied*, 414 U.S. 818 1973), the Fifth Circuit Court of Appeals found that there was a "strong possibility" that appellant's notice was received within the time allowed but, due to district court operating procedures, not marked filed until after the thirtieth day. *Id.* at 1365. Under those circumstances, the court of appeals held that the appellee had failed to carry its burden of showing that the appeal was untimely. *Id.*

Faced with a more ambiguous set of facts, the Court of Appeals for the Third Circuit, relying on *Da'Ville*, held in *United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976), "that whenever a notice of appeal is filed in a district court, it is filed as of the time it is actually received . . . even though it is designated as filed by the clerk's office at a later date." *Id.* at 876. Since it was unclear from the record when the notice was actually received, the court of appeals retained jurisdiction while remanding to the district court for an inquiry into the date of receipt. *Id.; see also Rothman* v. *United States*, 508 F.2d 648 (3d Cir. 1975).

In these and similar cases, *see, e.g., United States* v. *Preston*, 352 F.2d 352 (9th Cir. 1965); *Silverton* v. *Valley Transit Cement Co. Inc.*, 237 F.2d 143 (9th Cir. 1956), the courts of appeals have hesitated to dismiss appeals when it appeared that there was a possibility that the notice of appeal was actually received by the clerk prior to its formal filing. Given the drastic consequences of failing to satisfy the jurisdictional requirement of a timely notice, this solicitude is well warranted. In the case of *pro se* habeas corpus petitions filed by "unlettered prisoners without friends or funds," *Darr* v. *Burford*, 339 U.S. 200, 203 (1950), this hesitation to dismiss without a full inquiry should be even stronger. The Sixth Circuit, however, showed no such concern for Houston, even though, as discussed above, there are facts in the record that suggest

possible receipt of the notice on February 6. Regardless of whether the burden of proving the date of actual receipt lies with the appellant, *see United States* v. *Preston*, 352 F.2d 352 (9th Cir. 1965); *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960); *Silverton* v. *Valley Transit Cement Co. Inc.*, 237 F.2d 143 (9th Cir. 1956), or the appellee, *see Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir., *cert. denied*, 414 U.S. 818 (1973), the court of appeals should be fully informed of the relevant jurisdictional facts before dismissing a *pro se* appeal. Since the facts before the court of appeals were ambiguous as to the date of actual receipt, remand to the district court for further inquiry would have been appropriate. *United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976). Dismissal of the appeal without this further inquiry was error and should be reversed.

C. The Court Of Appeals Erred In Dismissing The Appeal When There Were "Unique Circumstances" Under *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), In That Petitioner Relied Upon The Actions Of The District Court And Court Of Appeals As Assurance That His Appeal Was Timely.

In *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), this Court recognized that there were certain "unique circumstances" under which the otherwise untimely appeal of a party who had reasonably relied upon a court's express or implied assurances of timeliness could be saved. Although such cases are rare, they do fall within the jurisdiction of the courts of appeals. Since this case presents just such unique circumstances, the court of appeals possessed jurisdiction to hear the appeal even if Houston's notice of appeal was not properly filed within the original or extended thirty day periods.

As early as 1957, this Court recognized that a party who reasonably relied upon ambiguous actions of the dis-

trict court as assurance that an appeal filed at a certain time was timely should not be denied his right to appellate review. *Rosenbloom* v. *United States*, 355 U.S. 80 (1957). Five years after *Rosenbloom*, the Court articulated the basis upon which courts of appeals could exercise jurisdiction over apparently untimely appeals in *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). In that case, the petitioner's counsel had requested a two week extension of the time to appeal under former Rule 73(a) of the Rules of Civil Procedure. The grounds given for the requested extension were that the client's general counsel, who was the only company representative with authority to decide whether to appeal, was vacationing in Mexico and therefore unavailable. The district court granted the extension and an appeal was perfected within the time allowed by the extension. The court of appeals dismissed the appeal due to petitioner's failure to show "excusable neglect based on a failure of a party to learn of the entry of the judgment," the only grounds for an extension under former Rule 73(a). This Court reversed, holding that

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.

371 U.S. at 217. Clearly, the unique circumstances presented in *Harris Truck Lines* were the petitioner's failure to file its notice within the time allowed due to the trial court's assurance that one filed within the extended period would be timely.

A similar issue was presented in *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964). There, a motion for new trial was filed twelve days after the judgment, and therefore failed to toll the running of the sixty day appeal period. The Immigration and Naturalization Service, however, made no objection to the motion and the trial judge stated that it was made "in ample time." *Id.* at 385. The petitioner filed a notice of appeal within sixty days of entry of the order denying a new trial but more than sixty days after entry of judgment denying the petition for naturalization. The court of appeals granted the Immigration and Naturalization Service's motion to dismiss the appeal on the grounds that the late motion for new trial had not tolled the sixty day appeal period and, since no notice was filed within sixty days of the judgment, it lack jurisdiction. This Court reversed on the authority of *Harris Truck Lines*, holding that the court of appeals had jurisdiction to hear an appeal when the district court leads an appellant to believe that an act tolling the running of the appeal period has been properly done and, in reliance upon that representation, the appellant who can still perfect a timely appeal does not file a notice of appeal within the original period. *Id.* at 386-87. In that same term, the Court reached the same result in a similar case from the Court of Appeals for the District of Columbia. *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964).

The courts of appeals have relied on *Harris Truck Lines*' unique circumstances rationale to preserve apparently untimely appeals when represented parties have foregone the steps necessary to perfect an appeal in reasonable reliance on acts of the trial court. *See, e.g. United Artists Corp.* v. *La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985); *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir.

1984); *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979). Thus, in *Lieberman* v. *Gulf Oil Corp.*, 315 F.2d 403 (2d Cir. 1963), an original judgment was amended to delete two parties at the defendant's request on December 27. The plaintiff, whose counsel received notice of the amendment and tried successfully to see it on December 28, filed a notice of appeal more than thirty days after entry of the original judgment but less than thirty days after entry of the amended judgment. The court of appeals found that plaintiff's attorney "could not unreasonably have concluded" that the amendment was made under Rule 59(e), which would have restarted the appeal period, rather than under Rule 60(a), which did not. *Id.* at 406. Under these facts, the court of appeals held that *Harris Truck Lines* required that the appeal be heard on the merits.

The Court of Appeals for the Ninth Circuit reached a similar result in *In re Estate of Butler's Tire and Battery Co., Inc.*, 592 F.2d 1028 (9th Cir. 1979), an action by a bankruptcy trustee to subordinate the security interest of Ferrous Financial Service. Twenty days after the bankruptcy court entered its judgment, the appellant filed a request for extension of the time to appeal to district court. The oral argument on the motion for extension was scheduled after the expiration of the twenty day extension period allowed under bankruptcy rule 802 upon a showing of excusable neglect. The Bankruptcy Court granted the extension but the district court dismissed the appeal for untimeliness. The Ninth Circuit reversed, stating "[w]e conclude that Ferrous reasonably withheld filing of the notice of appeal until the court had ruled on the claim of excusable neglect and should not be penalized for relying upon the court's decision to calendar argument for a date beyond the applicable time limits." *Id.* at 1032

(footnote omitted). Thus, as in *Harris Truck Lines* and *Thompson*, the court recognized that reasonable reliance on the acts of a judge may preserve jurisdiction over an otherwise untimely appeal.

In this case, Houston's notice of appeal was stamped filed at 8:30 a.m. on February 7, 1986, the thirty-first day. At that point, he had twenty-nine days in which to move for an extension for excusable neglect under Rule 4(a)(5) of the Rules of Appellate Procedure. His response to the court of appeals' order to show cause of March 21, J.A. 26, indicates that he would have presented a strong case for such an extension. *See Doctor* v. *Seaboard Coast Line R.R. Co.*, 540 F.2d 699 (4th Cir. 1976) (mailed on twenty-ninth day, filed on thirty-first day); *Evans* v. *Jones*, 366 F.2d 772 (4th Cir. 1966) (mailed on twenty-eight day, filed on thirty-first day). The actions taken by the district court and court of appeals during the thirty days allowed for seeking an extension—the issuance of a certificate of probable cause and a briefing schedule—had the effect of lulling Houston into the mistaken belief that his notice of appeal had been timely received. And while it might not have been reasonable for a member of the bar to reach such a conclusion, Houston, who accurately described himself to the court of appeals as "a layman of the law, with only little understanding thereto," J.A. 26, could have reached no other. Such detrimental reliance on implicit assurances of timeliness is precisely the sort of unique circumstances recognized in *Harris Truck Lines* and, under *Harris*, the one day delay in filing petitioner's notice of appeal did not deprive the court of appeals of jurisdiction.

D. Houston's Notice Of Appeal Should Be Treated As A Motion For Extension Of Time Under Rule 4(a)(5).

Rule 4(a)(5) sets forth the procedure by which a litigant may receive an extension of time within which to file the

notice of appeal. The rule provides that a motion may be filed within thirty days of the prescribed time period requesting an extension of time for filing a notice of appeal. "[U]pon a showing of excusable neglect or good cause" the court may grant a thirty day extension or up to a ten day extension from the entry of the order granting extension. Fed. R. App. P.4(a)(5).

Prior to 1979 the counterpart to Rule 4(a)(5) had provided as follows:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Fed. R. App. 4(a), 28 U.S.C. app. (1976). Under this predecessor to present Rule 4(a)(5), an untimely filed notice of appeal filed within sufficient time to allow the district court to extend the time to file the notice entitled the litigant to justify his delay in accordance with the rule. *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979); *Moorer* v. *Griffin*, 575 F.2d 87 (6th Cir. 1978); *United States* v. *Shillingford*, 568 F.2d 1106 (5th Cir. 1978); *Craig* v. *Garrison*, 549 F.2d 306 (4th Cir. 1977); *Reed* v. *Michigan*, 398 F.2d 800 (6th Cir. 1968). The accepted construction was clear that any document filed within the total appeal time (generally thirty days from the entry of the order plus thirty days) which could be construed as either the notice of appeal or a motion for extension entitled the pro se litigant to justify his delay and entitled the district court to excuse it.

This portion of the rule was amended in 1979 for limited purposes. First, the literal reading of the rule had produced some confusion and even some criticism, most notably by Judge Friendly of the United States Court of Appeals for the Second Circuit. *In re Orbitec Corp.*, 520 F.2d 358 (2d Cir. 1975). The literal language of the rule seemed to suggest that the request for extension of time *and* the order granting an extension would both have to occur within thirty days after the expiration of the original appeal period. This construction had been strengthened by the early committee comments to the rule's predecessors and case law. J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶ 204.13[2] (2d ed. 1987). Thereafter, following a 1966 decision by the Fourth Circuit, the general rule of preserving the appeal if the notice of appeal was filed within the total appeal time developed and became generally applied. *Evans* v. *Jones*, 366 F.2d 722 (4th Cir. 1966); *see* J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶ 204.13[2] n.10 (2d ed. 1987).

Still some confusion remained as to the timing of the order granting an extension of time. Judge Friendly explored the controversy in *In re Orbitec Corp.*, 520 F.2d 358 (2d Cir. 1975). Therein the Second Circuit held that a notice of appeal had to be filed no later than sixty days after the judgment from which an appeal is sought. The court also refused to treat a motion for extension filed within the sixty days as a notice of appeal when the prospective appellant was represented by an attorney at the time. In order to clarify this uncertainty the rule was amended in 1979 to allow the notice to be filed within ten days of the order granting an extension of time.

In additional to correcting this situation, the 1979 amendment specified that any request for extension must be made by motion, though at particular times the motion

may be *ex parte*. Finally, the amendment added an additional ground for which an extension might be sought - "good cause" Fed. R. App. P.4 (a)(5).

Following the amendment to the rule, many courts began to apply a different, but neither required nor suggested, interpretation to motions for extensions of time. Courts that had previously held that late-filed notices of appeal could be treated as motions, changed their interpretations and attributed the change to the 1979 amendments without careful analysis. *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert denied*, 466 U.S. 975 (1984); *Pryor* v. *Marshall*, 711 F.2d 63 (6th Cir. 1983); *Mayfield* v. *United States Parole Comm'n*, 647 F.2d 1053 (10th Cir. 1981); *Sanchez* v. *Board of Regents*, 625 F.2d 521 (5th Cir. 1980).

The Fourth Circuit more carefully scrutinized the judicial rule change in *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984). A panel of the Fourth Circuit had upheld the circuit's earlier decisions in allowing a late-filed notice of appeal to serve as a motion for extension of time. *Shah* v. *Hutto*, 704 F.2d 717 (4th Cir. 1983). On rehearing en banc, the panel decision was overturned and the Fourth Circuit declared that notices of appeal without manifest requests for additional time would not be construed as motions. *Id.* at 1168-69. In so holding, the court dismissed an appeal of a *pro se* civil rights action even though the notice was either misdelivered or lost in the post office and notwithstanding the fact that the litigants were pro se and incarcerated.

The dissent recognized as has the commentators in the area, that the rule change was not intended to affect the motion for extension but only to address and correct the *In re Orbitec Corp.*, 520 F.2d 358 (2d. Cir. 1975) problem.

Shah v. *Hutto*, 722 F.2d 1167, 1169 (4th Cir.), (Haynsworth, J., dissenting), *cert. denied*, 466 U.S. 975 (1984). J. Moore, B. Ward & J. Lucas, 9 Moore's Federal Practice ¶ 204.02[1] (2d. ed. 1987). In dissent, Judges Haynsworth, Winter, Murnaghan, and Ervin noted that the 1979 amendments effected three substantive changes in Rule 4(a)(5), none of which is relevant to the problem presented in this case." *Id.* at 1169. The dissent went on to discuss the *Orbitec* revision which "solved a vexing problem created by a rigid interpretation of an earlier version of the rule. Nothing in those changes, however, appears . . . to be a rejection of the kind of flexible application of the rule represented by *Craig* v. *Garrison*, and kindred cases in both the Supreme Court and the Courts of Appeals." *Id.*

Some courts have continued to give validity to the pre-1979 amendment interpretation, following the rationale of the dissent in *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), at least to the extent that a remand for a good cause or excusable neglect determination is required. In *Fearon* v. *Henderson*, 756 F.2d 267 (2d Cir. 1985) a district court remand was ordered by the United States Court of Appeals for the Second Circuit in a section 1983 action in which the notice of appeal was filed fifty-six days after judgment was entered. The court remanded and ordered the district court to "determine whether to treat the notice of appeal as an application for extension of time pursuant to rule 4(a)(5) and whether, in the interests of justice, the late appeal should be allowed." *Id.* at 267-68 (citing *Stirling* v. *Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975)).

In the case at bar the United States Court of Appeals for the Sixth Circuit never gave Houston that opportunity. While they did allow him to show cause why his appeal should not be dismissed, J.A. 26, they never

addressed the issues raised in his filing, J.A. 25-26, nor remanded to permit the district court to do so.

Some courts, while not allowing the late-filed notice of appeal to serve as the motion, have provided a procedure to assist the litigant who files a notice of appeal which he relies on as timely. In *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979), the United States Court of Appeals for the Tenth Circuit saw the inequities which existed for *pro se* litigants and grappled with the problem that occurs when the *pro se* appellant is not notified of his technical noncompliance until it is too late to remedy the problem by filing a motion for extension: "It would be most helpful if the district court would advise a would-be appellant, and particularly one who is pro se, that his notice of appeal is untimely, thereby putting him on notice that some immediate action is yet required to secure appellate jurisdiction." *Id.* at 245. The Eighth Circuit in *Campbell* v *White*, 721 F.2d 644 (8th Cir. 1983), fortified the procedure by declaring it mandatory that district court clerks review notices of appeal for timeliness and advise *pro se* litigants when it is necessary for them to file a motion for extension of time. Additionally, the court required the preparation of a notice for litigants which explained the time requirements of Rules 3 and 4. *Id.* at 647. Although the Sixth Circuit endorsed these protections in the *pro se* context in *Pryor* v. *Marshall*, 711 F.2d 63, 65 n.4 (6th Cir. 1983) (quoting *United States* v. *Lucas*, 597 F.2d 243, 245 (10th Cir. 1979)), it provided no such protection for Houston. J.A. 31. Thus Houston learned of the untimeliness of his petition after it was too late to do anything to rectify the situation, J.A. 23, and his appeal from the denial of his petition for habeas corpus has been barred permanently.

This Court has described the writ of habeas corpus as

> the fundamental instrument for safeguarding individual freedom against arbitary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. Const., Art I, § 9, cl. 2. The scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris v. *Nelson*, 394 U.S. 286, 290-91 (1969). Although it is a civil proceeding, *Ex Parte Tom Tong*, 108 U.S. 826 (1883), this "label is gross and inexact." *Harris* v. *Nelson*, 394 U.S. 286, 293-94 (1969). In recognition of the unique nature of the proceeding, *id.* at 294, Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts limit the applicability of the Federal Rules of Civil Procedure. In the context of a *pro se* petition for habeas corpus the requirement of a formal motion for extension, such as would satisfy rule 7(b) of the Federal Rules of Civil Procedure, is inconsistent with the leniency which this Court has shown *pro se* litigants in general, *see Haines* v. *Kerner*, 404 U.S. 519 (1972), and habeas corpus petitioners in particular. *See Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941). In habeas corpus cases, above all others, "the proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets*, 354 U.S. 156, 165 (1957). For that reason, if for no other, Houston's *pro se* notice of appeal filed on the thirty-first day should be treated as timely or, alternatively, as a motion for an extension and the case

returned to the district court for a determination of the issue of excusable neglect under Rule 4(a)(5).

CONCLUSION

For the reasons set forth above, Petitioner Prentiss Houston respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and this case remanded for consideration on the merits or, in the alternative, that the case be remanded with instruction for further remand to the United States District Court for the Western District of Tennessee, Eastern Division for a full inquiry into the jurisdictional facts.

Respectfully submitted,

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